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No. 03-283

In the Supreme Court of the United States

SHELL PETROLEUM INC., AND SUBSIDIARY CORPORATIONS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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8 pp

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

Conclusion 5

TABLE OF AUTHORITIES

Beck v. Alabama, 447 U.S. 625 (1980) 3

Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1997) 3

Carlson v. Green, 446 U.S. 14 (1980) 3

Commissioner v. Sunnen, 333 U.S. 591 (1948) . . . 1, 2, 4

Harris Trust and Savings Bank v. Solomon Smith Barney, 530 U.S. 238 (2000) 3, 4

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 3, 4

Montana v. U.S., 440 U.S. 147 (1979) 3

PGA Tour, Inc. v. Martin, 531 U.S. 661 (2001) 1, 4

United States v. Stauffer, 464 U.S. 165 (1984) 4

Yee v. City of Escondido, 503 U.S. 519 (1992) 3, 4

ARGUMENT

Respondent erroneously contends that the Court should deny certiorari on the separable facts question on the ground that Shell did not preserve the issue in the courts below. Shell did preserve the issue. But even if Shell had not done so, the Court could and should hear this argument, as it has done many times when lower courts had misconstrued the Court's jurisprudence.

1. In the Court of Federal Claims, Shell argued forcefully that *Commissioner v. Sunnen*, 333 U.S. 591 (1948), and the separable facts doctrine set forth therein, preclude the application of collateral estoppel here. The trial court, however, rejected the argument. In its opinion, the Court of Federal Claims stated (Pet. App. 48a-49a):

> . . . Plaintiffs maintain that issue preclusion is inappropriate in this tax refund case because, pointing to an exception to the doctrine of issue preclusion in tax cases, the facts in the previous case must be identical to those in the second case and the legal issue in both cases must be inseparable. *Commissioner v. Sunnen*, 333 U.S. 591 . . . However, the Plaintiffs fail to mention in their briefs the case *Montana v. United States*, 440 U.S. 147 . . . which distinguishes Sunnen insofar as the *Sunnen* rule only applies to those situations where a "change in controlling legal principles had occurred between [the prior suit] and the instant suit . . .".

On appeal, Shell again pressed the *Sunnen* decision as grounds to limit the application of collateral estoppel in tax cases. Appellants Br. 18. Also, Shell's arguments regarding *Sunnen* and the separable facts doctrine, as well as the trial

court's disposition of the argument, were included in the record on appeal. At no point did Shell abandon the argument.

2. In its brief in opposition, respondent implies that Shell conceded that collateral estoppel applies and therefore abandoned its separable facts theory. Resp. Opp. 9. What Shell said in the portion of its appellate brief to which respondent refers is what it has stated all along in the litigation: It accepts the conclusion of the Third Circuit that the FEA definition applies so the parties can move forward and address specifically what the FEA definition means and whether Shell meets the definition. This was Shell's position before the Court of Federal Claims when Shell also pressed the separable facts doctrine, and it maintained this position on appeal. There was no concession that *Sunnen* and the separable facts doctrine are inapplicable. Further, the Court should reject respondent's contention (Resp. Opp. 9) that Shell's discussion of *Sunnen* in its appellate brief was insufficient to preserve the separable facts issue. There were no magic words that Shell was required to incant. In light of the fact that the only aspect of *Sunnen* at issue before the Court of Federal Claims was the separable facts doctrine, Shell's arguments to the Federal Circuit viewed within the overall context of the litigation were sufficient to satisfy any procedural obstacles to seeking further review.

3. Moreover, even if Shell had not so pressed the matter in the lower courts, this Court still has discretion to consider the issue on certiorari, and it would be appropriate to do so in this case. Although the Court ordinarily does not review issues raised for the first time in a petition, there are no procedural obstacles that prevent the Court from considering an issue that has not been raised below. The general rule is purely prudential, and the Court has departed from it on

numerous occasions. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 320 n.6 (1997) (Court considered an issue that neither party had raised at any stage of the proceedings); *Carlson v. Green*, 446 U.S. 14, 17 (1980) (Court considered an issue even though petitioner did not raise it in either the trial or appellate courts); *Beck v. Alabama*, 447 U.S. 625, 632 fn.6 (1980) (Court considered an issue that had been raised in the state trial and intermediate courts but not in the court whose decision was under review). In addition, a party is always free to make new *arguments* in support of issues that are properly presented in the lower courts. *See, e.g., Harris Trust and Savings Bank v. Solomon Smith Barney*, 530 U.S. 238, 245 fn.2 (2000); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)").

4. Even under the government's articulation of the issue presented below, the separable facts matter constitutes an argument fairly included within the general issue in the subject litigation. In its brief in opposition, the government states the issue presented as (Resp. Opp. (I)):

> Whether petitioners are collaterally estopped by the decision in *Shell Petroleum, Inc v. United States*, 182 F.3d 212 (3d Cir. 1999) from relitigating whether oil produced using enhanced recovery techniques that were in use in 1980 qualifies for the tax credit for "oil produced * * * tar sands" under 26 U.S.C. 29.

One of the arguments against the application of collateral estoppel—and fairly embraced within the broader question—is whether the doctrine of collateral estoppel applies in a tax case where the facts are separable from the previously litigated case. Thus, under the principles set forth in *Harris Trust and Savings Bank, PGA Tour, Inc., Lebron* and *Yee*, the separable facts argument is properly presented.

5. Furthermore, the Court should exercise its discretion to grant review, because the appeals court ignored this Court's precedent in rendering its decision, and this matter presents an opportunity to address important questions that have not been, but should be, settled by this Court. The Court should reconcile the tension between its decisions in *United States v. Stauffer*, 464 U.S. 165 (1984), which implies the separable facts doctrine is valid in tax cases, and *Montana v. U.S.*, 440 U.S. 147 (1979), which some lower courts, including the Court of Federal Claims in this litigation, believe overruled by implication the separable facts doctrine of *Sunnen*. Further, in keeping with the Court's role in supervising the proper functioning of the judicial process, the Court should resolve the issues presented because they implicate the delicate balance between the needs of judicial economy and the rights of parties to have their day in court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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